United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6076

Original

United States Court of Appeals

FOR THE SECOND CIRCUIT

BAY RIDGE ACTION COMMITTEE, INC., et al.,

Plaintiffs-Appellants,

against

THOMAS EKELAND, et al.,

Defendants-Appellees.

B&L

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE NEW YORK STATE COMMISSIONER OF HOUSING AND COMMUNITY RENEWAL

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Statement

This is an appeal from the denial of a preliminary injunction sought by the plaintiffs to enjoin the construction of senior citizen housing in the Bay Ridge section of Brooklyn.

The preliminary injunction was denied by the District Court for the Eastern District of New York on July 25, 1975. District Judge Dooling wrote an extensive Memorandum incorporating Findings of Fact which Memorandum appears at pp. 131a-171a of the Joint Appendix.

The State of New York, through its Commissioner of Housing and the New York State Housing Finance Agency, has made a mortgage commitment of $22,550,000 to finance construction of the project.

The history of the project from 1970 to the present, including the revisions made in it, the hearings before the New York City Planning Commission and before the City's Board of Estimate, are set forth in the Memorandum of District Judge Dooling and in Commssioner Goodwin's affidavit at pp. 50a-61a of the Joint Appendix.

The brief submitted by the United States Attorney on behalf of the Federal defendants deals with the question of the environmental impact of this project and the Federal finding that the project did not significantly affect the human environment. This is the only issue discussed in Appellants' Brief. This brief will deal with other matters going to the equities of the case.

POINT I

The significant delay in seeking the preliminary injunction militates against the plaintiffs' right to such an injunction.

The plaintiffs actively opposed this project during the years before construction actually began on January 5, 1975. Joint Appendix p. 52a. Yet they did not begin this action until April 1, 1975 (Docket entry, p. 1a, of the Joint Appendix).

Nearly two months later, on May 23, 1975, they first moved for the preliminary injunction (*Ibid.*). They did not press for a hearing on that application and it was not until July 7, 1975, that a hearing was set to be held on the application (Docket entry, p. 2a of the Joint Appendix).

Judge Dooling handed down his decision on July 25, 1975. Although in matters of stays and injunctions, this Court

frequently approves procedures to permit an expedited appeal; this appeal is not scheduled to be heard by this Court until December, 1975.

As of the date of Commissioner Goodwin's affidavit in opposition to the preliminary injunction, June 5, 1975, the buildings had reached the first or second floor level; the State had disbursed $3,665,000. See Joint Appendix, pp. 52a-53a.

At present the buildings are "topped out"; the State has disbursed on the project, $8,113,788.

The grant of a preliminary injunction would now stop completion of this project to house senior citizens. It would leave an empty shell, doing no one any good. Thousands of applications for the apartments have been received. See Joint Appendix, pp. 54a, 68a. If it is ultimately decided on the merits that the plaintiffs have no case, the delay in the completion, interest on the money invested, contractors' damages, etc., will ultimately have to be reflected in higher rentals to the tenants.

The plaintiffs, by happenstance, are the beneficiaries of a project, which from any point of view, is preferable to what *might* have been erected on this 2½ acre site. If the sponsor of the project, Lutheran Medical Center, had carried out its original purpose in buying the land, it would have erected a new hospital on the site. See Joint Appendix, p. 56a. Such a hospital would have had greater impact on the neighborhood than the senior-citizen housing now being erected. If a private builder had bought the property, he could, under the existing zoning regulations, have built a very high rise structure on it, 22 stories at least.

POINT II

The State and the other non-Federal defendants should not be prejudiced by any complaint as to the Federal environmental clearance, assuming any such complaint is justified.

The federal presence in this case arises from an application by the State Housing Commissioner for subsidy under § 236 of the Housing Act of 1937 as amended (12 U.S.C. 1715 [2]-1). Such a subsidy would substantially reduce the rental burden on the senior citizen tenants.

On March 11, 1974, the State Commissioner of Housing filed an application for the subsidy on HUD Form ECO-1 supplying extensive information. Judge Dooling observed that the information supplied was very detailed. Joint Appendix, p. 144a.

The State officials concealed nothing—indeed it is hard to see what could be concealed on what Judge Dooling correctly observed was a "familiar type of project" (*Ibid.*). Two 14-story buildings in the City of New York are not a remarkable matter. The area already contained 6, 7 and 11 story buildings. Joint Appendix, p. 102a. There were no unknown facts to be investigated. This was not an atomic energy plant; it was not a pipeline. It was not a six or eight lane interstate highway cutting through park land or virgin territory. It was not a jail. It was not a post office garage or a Federal Office Building. It was not an overland high voltage transmission line. It was not a dam intended to flood hundreds of thousand of acres. It was not a barge canal cutting across a state. It was not part of a program to redevelop a twenty-block area of the City. We mention all of these because they are the type of projects which are the subject matter of cases cited in the appellants' brief.

The closest fact pattern to the present case of the cases cited by the appellants is probably *Goose Hollow Foot-*

hills League v. *Romney,* 334 F. Supp. 877 (D.C., D. Oregon, 1971). This involved a 16-story housing project, primarily for students, in an area where there were no other high rise buildings. The Court observed that the National Environmental Protection Act does not require an environmental impact statement in every case in which a Federal agency finances a project. Such a statement is required only where the project will have a significant effect on the human environment. The Court there held that HUD had not given adequate consideration to several factors which it listed—but *all* of those factors were considered in the present case.

Having received environmental clearance for this "familiar type of project", the State had no occasion to inquire as to what HUD did or did not do in reaching its conclusions. The environmental clearance received by the State officials in late 1974, seemed to be comprehensive and detailed. It was clear that HUD had made an independent survey as to some of the matters and to a large extent the ECO submission was, as Judge Dooling noted, self-verifying. Joint Appendix, p. 167a.

To require the State officials in the face of this comprehensive report on a very usual type of building in the City of New York to re-examine what HUD did is manifestly unfair. The State officials acted in good faith, without fraud, concealment or the "coverup" of any detrimental facts. Judge Dooling found no fraud or any evidence of fraud. Joint Appendix, pp. 158a-159a. The finding by HUD that the project would not significantly affect the environment in this portion of the City seems a reasonable one. The project had been the subject of extensive public hearings at which all manner of objections had been voiced. HUD's report covered or mentioned all of these. The State officials were on no notice any further inquiry was required.

One matter raised by the appellants deserves comment. They urge that alternate sites were not considered for this

project. There are several answers to this. First, the fact the project was sponsored by a Hospital which presumably would have a continuing interest in the project and its elderly residents made the site, owned by that Hospital, the project's sponsor especially attractive. Second, there are few 2½ acre plots of vacant land in residential sections still to be found in Brooklyn. Third, the land was vacant; no occupants would have to be relocated. Fourth, the site was an attractive and pleasant one. There is no reason why senior citizens should not have the full enjoyment of the Harbor, the Verrazzano Bridge and the other amenities of the neighborhood. The suggestion at p. 27 of the appellants' brief that low-rise, low-density, garden-type apartments would be more desirable, flies in the face of two facts. First, to build any reasonable number of such apartments would have required use of a much larger portion of the land site. Second, many of the elderly do not take easily to walking even two or three flights of stairs to reach their apartments.

CONCLUSION

The determination of the District Court should be affirmed.

Dated: New York, New York, December 1, 1975.

Respectfully submitted,

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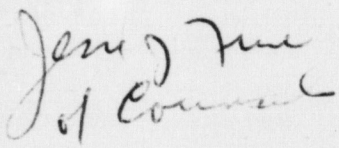

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARILYN L. HOWARD, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendant Goodwin herein. On the 2nd day of December, 1975, she served the annexed upon the following named persons:

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in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a postpaid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Marilyn L. Howard
MARILYN L. HOWARD

Sworn to before me this
2nd day of December, 1975

Jane J. Fine
Assistant Attorney General
of the State of New York